Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-1125

NO. A-421

The Honorable JOE J. FISHER,
United States District Judge,
Petitioner

v.

Cooper Tire & Rubber Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons the Writ Should Be Granted	6
I. IMPORTANCE OF THE QUESTIONS PRESENTED	
A. IN RECOGNITION OF ITS OBLIGATION TO SUPERVISE THE LOWER FEDERAL COURTS, THE COURT OUGHT TO DECIDE ON THE PROPRIETY OF MANDAMUS AS A REMEDY IN THE DISPOSITION OF §1404(a) MOTIONS	6
B. THE ISSUANCE OF A WRIT OF MANDAMUS UPON A FAILURE TO TRANSFER IS INCONSISTENT WITH THE JURISDICTION CONFERRED ON THE COURT OF APPEALS BY CONGRESS IN THE ALL WRITS ACT	7
II. CONFLICT OF DECISIONS	
A. AN ISSUANCE OF MANDAMUS WITHOUT GIVING THE PARTY TO WHOM THE WRIT IS ADDRESSED AN OPPORTUNITY TO RESPOND IS AN ARBITRARY EXERCISE OF JUDICIAL POWER	9
B. BY GRANTING MANDAMUS IN THIS CASE, THE FIFTH CIRCUIT HAS ADOPTED A LIBERAL STANDARD FOR THE ISSUANCE OF EXTRAORDINARY WRITS, ONE THAT CONFLICTS WITH DECISIONS IN THE OTHER CIRCUITS	9
Conclusion	13
Certificate of Service	14

LIST OF AUTHORITIES

CASES — Page

All States Freight, Incorporated v. Modrelli, 196 F.2d 1010 (3d Cir. 1952) 10

Chicago R.I. & P.R.R. v. Hugh Breeding, Incorporated, 247 F.2d 217 (10th Cir. 1957), *cert. denied* 355 U.S. 880 . . . 8

Clayton v. Warlick, 232 F.2d 699 (4th Cir. 1956) 10, 13

Codex Corporation v. Milgo Electronic Corporation, 555 F.2d 735, 737 (1st Cir. 1977) 10

Ellicott Machine Corporation v. Modern Welding Company, 502 F.2d 178, 181 (4th Cir. 1974) 11

Great Northern Railway Co. v. Hyde, 238 F.2d 852 (8th Cir. 1956) 10

In Re Josephson, 218, F. 2d 174, 181 (1st Cir. 1954) 8,10,12

Kasey v. Molybdenum Corporation of America, 408 F.2d 16, 19-20 (9th Cir. 1969) 12

Lemon v. Druffel, 253 F.2d 680, 685 (6th Cir. 1958) 11

Lora Company v. Alsop, 565 F.2d 998, 1000, (8th Cir. 1977) . 12

McGraw-Edison Company v. Van Pelt, 350 F.2d 361 (8th Cir. 1965) 12

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 6

A. Olinick & Sons v. Dempster Brothers, Inc. 365 F.2d 439, 445 (2d Cir. 1966) 11, 12

Soloman v. Continental American Life Insurance, 472 F.2d 1043 (3rd Cir. 1973) 11

Starnes v. McGuire, 512 F.2d 918, 929 (D.C. Cir. 1974) 11

Sypert v. Miner, 266 F.2d 196, 199 (7th Cir. 1953) 12

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 146-147 (10th Cir. 1967) 12

Van Dusen v. Barrack, 376 U.S. 612, 615 fn.3 (1964) 7

Will v. United States, 389 U.S. 90, 107 (1967) 9

STATUTES — Page

28 U.S.C. §1404(a) 2,3,4,5, 6,7,10

28 U.S.C. §1651(a) 3,7,10

RULES

Rule 21(b), Federal Rules of Appellate Procedure 5

Rule 40, Federal Rules of Appellate Procedure 5

OTHER SOURCES

15 Wright, Federal Practice and Procedure §3855 1976 7

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OCTOBER TERM, 1978

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The Honorable JOE J. FISHER,
United States District Judge,
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v.

Cooper Tire & Rubber Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

The Honorable Joe J. Fisher, United States District Judge for the Eastern District of Texas, respectfully requests that a writ of certiorari issue to review the issuance of a writ of mandamus by the United States Court of Appeals for the Fifth Circuit ordering him to transfer a cause of action from his district to the Northern District of Texas, Lubbock Division.

OPINIONS BELOW

All opinions and orders regarding the motion to transfer, denial of mandamus, renewed motion to transfer, subsequent denial of mandamus, and the granting of mandamus on rehearing are unreported. The orders and opinions of the Petitioner, as well as the orders and opinions of the Fifth Circuit are appended hereto.

JURISDICTION

A final order issuing a writ of mandamus was entered on Respondent's motion for rehearing by the Court of Appeals for the Fifth Circuit on August 31, 1978. Petitioner moved for an extension of time in which to file his petition for certiorari on October 30, 1978. The Honorable Justice Lewis F. Powell, Jr. granted Petitioner's request on November 6, 1978, and extended time for filing this petition up to and including January 13, 1979. The statutory provision which confers jurisdiction on this Court is 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is mandamus an appropriate remedy for errors in discretion in granting/denying 28 U.S.C. §1404(a) motions for transfer?

2. Assuming mandamus is proper under certain circumstances, can it ever be validly issued when a judge denies a §1404(a) motion?

3. Is the issuance of mandamus without giving the party to whom it is addressed an opportunity to respond an arbitrary exercise of discretion?

4. Has the Fifth Circuit adopted a liberal standard for issuing the extraordinary writ of mandamus, one that conflicts with its sister circuits?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer all civil action to any other district or division where it might have been brought."

28 U.S.C. §1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The procedural posture of this case requires illumination; in reaching this Court, it has not travelled the customary path of a writ of mandamus issued to a United States District Judge. The Respondent began this "trial on venue" on August 22, 1977, when it filed its original motion to transfer a cause of action styled *Davidson, et al v. Cooper Tire and Rubber Company* from the Eastern District of Texas, Marshall Division, to the Northern District of Texas, Lubbock Division.

After briefs were submitted by both parties but without a hearing on the merits of the transfer request, the Petitioner denied the motion to transfer made under the terms of 28 U.S.C. §1404(a) on November 29, 1977. The corporate Defendant then petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus directing transfer on December 23, 1977.

The Fifth Circuit declined to issue a writ of mandamus on that petition, but did order an answer filed on behalf of Judge Fisher. On February 16, 1978, the Fifth Circuit found that Judge Fisher's order of November 29, 1977 had been entered prematurely. The Court counseled the Respondent to renew the motion to transfer, and further counseled that a hearing should be held on the merits of any renewed motion to transfer.

The Respondent followed the advice of the Fifth Circuit; a renewed motion was filed on March 29, 1978. Plaintiffs responded after affidavits and additional briefing. In accordance with the Fifth Circuit's admonition, a hearing was held on the §1404(a) motion to transfer on April 4, 1978 in Marshall, Texas. The hearing was presided over by the Petitioner, and each of the named Plaintiffs was present.

After taking the merits of the transfer request under advisement, Petitioner denied the renewed motion to transfer on April 14, 1978. Judge Fisher considered the statutory criteria of convenience of the parties and witnesses as well as the interests of justice in denying the second transfer request. The order reflects consideration of the following factors:

1. The Plaintiffs' choice of forum — the Eastern District of Texas, Marshall, Division.
2. The comparative docket conditions between the Marshall court and Lubbock court.
3. The fact that Marshall, Texas was readily accessible to all the witnesses and more accessible to several of the witnesses than was Lubbock, Texas.
4. The lack of any demonstrable inconvenience to the corporate Defendant by trial in Marshall, Texas.

It is apparent from the order itself that the Petitioner relied on the mandate of §1404(a) in exercising the discretion given him by Congress in denying the motion to transfer.

Believing the Petitioner had erred, Respondent attempted to secure certification under 28 U.S.C. §1292(b) of the transfer question in order to obtain appellate review. Judge Fisher refused to amend his order of April 14, 1978 to allow such review. Thereafter, Respondent filed another petition for a writ of mandamus in the Court of Appeals for the Fifth Circuit.

Without ordering answer by the Petitioner in accordance with Rule 21(b), Federal Rules Appellate Procedure, the Fifth Circuit denied the petition for a writ of mandamus in a one-sentence order dated and filed June 5, 1978.

On June 19, 1978, the Respondent filed a petition for rehearing. An answer, having failed to be requested by the Fifth Circuit pursuant to Rule 40(a), Federal Rules Appellate Procedure, was not filed on behalf of Petitioner. Therefore, contrary to his reliance on the propriety of his action as evidenced by the Fifth Circuit's failure to require response, the Petitioner was astounded when a writ of mandamus was issued on rehearing by a divided panel. The per curium majority opinion was filed on August 31, 1978. The Petitioner was commanded to transfer the cause of action to the Northern District of Texas, Lubbock Division, without ever having been given the opportunity to respond to charges that he had abused his discretion in the exercise of the judicial function.

REASONS THE WRIT SHOULD BE GRANTED

I.

IMPORTANCE OF THE QUESTIONS PRESENTED

A. In Recognition Of Its Obligation To Supervise The Lower Federal Courts, The Court Ought To Decide On The Propriety Of Mandamus As A Remedy In The Disposition of §1404(a) Motions.

While the Courts of Appeals have concurred that mandamus may be an appropriate remedy under certain circumstances in a ruling on a motion to transfer to a more convenient forum, this Court has never authorized the use of mandamus. The Court has twice acknowledged the fact that it has not approved mandamus as a remedy for a grant or denial of a §1404(a) motion to transfer. The first opportunity to rule on the appropriateness of a writ of mandamus as a remedy in this situation came in *Norwood v. Kirkpatrick,* 349 U.S. 29 (1955). There the Court noted:

> Since we find that the district judge properly construed §1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is the proper remedy.

Norwood, at 33.

The Court again declined to rule on the question, but noted its reluctance to decide the question in a footnote:

> Although it is clear that this Court has jurisdiction to review the judgment of the Court of Appeals, the Government, a defendant in this case, urges that the judgment below be reversed because mandamus was an improper remedy . . . Since in our opinion the courts below

> erred in interpreting the legal limitations upon and criteria for a §1404(a) transfer, we find it unnecessary to consider the mandamus contentions advanced by the government.

Van Dusen v. Barrack, 376 U.S. 612, 615 fn.3 (1964). A leading commentator has urged that the Court resolve the question on whether mandamus is available to a disappointed litigant as a remedy for an adverse ruling on a §1404(a) motion to transfer.[1] The Court should indeed invoke its sweeping power over the operation of the federal courts in the federal system as recognized in the Court's own Rule 19 and grant certiorari to resolve this important federal question.

B. The Issuance Of A Writ Of Mandamus Upon A Failure To Transfer Is Inconsistent With The Jurisdiction Conferred On The Courts of Appeals By Congress In The All Writs Act.

Assuming *arguendo,* that mandamus is appropriate when a District Judge grants a §1404(a) motion to transfer, that does not settle the question as to whether mandamus is available on a refusal to transfer. The All Writs Act states that the federal courts may:

> issue all writs necessary or appropriate in aid of their respective jurisdictions.

28 U.S.C. §1651(a).

If mandamus is to be issued only upon aid of jurisdiction, its issuance in a refusal to transfer is improper:

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1. 15 Wright, *Federal Practice and Procedure* §3855 (1976).

> If the district judge had held on to the case, i.e., had denied the motion to transfer such action would have preserved, not frustrated any potential appellate jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying transfer, on the pretense that such a review would be in 'aid' of our appellate jurisdiction.

In Re Josephson, 218 F. 2d 174, 181 (1st Cir. 1954).

Simply stated, in cases in which a District Judge transfers a cause out of his appellate circuit, a Court of Appeals might justifiably grant a writ of mandamus since the issuance of such a writ would be in aid of jurisdiction for without such a writ the Court of Appeals would never have jurisdiction over the transfer question. Transfer questions are available for review on appeal,[2] and to allow mandamus on an issue which is capable of review on appeal conflicts with the long-standing federal policy against piecemeal appeals.

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2. *Chicago R.I. & P.R.R. v. Hugh Breeding, Incorporated,* 247 F.2d 217 (10th Cir. 1957), *cert. denied,* 355 U.S. 880.

II.

CONFLICT OF DECISIONS

A. An Issuance Of Mandamus Without Giving The Party To Whom The Writ Is Addressed An Opportunity To Respond Is An Arbitrary Exercise Of Judicial Power.

In a case in which the Seventh Circuit granted a writ of mandamus without findings of fact or an opinion, this Court wrote:

> Mandamus is not a punitive remedy. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon wich the Government rests its attempt to justify the action below.

Will v. United States, 389 U.S. 90, 107 (1967).

The absence of a statement of the Seventh Circuit's legal reasoning was a sufficient ground for the reversal of the order granting the writ. Surely the same rationale must be followed in this case. The Fifth Circuit could not have reached a reasoned decision without considering both sides of the question. In the peculiar posture of this case, the issuance of the writ was truly a shot from the blue; and, the Fifth Circuit's order should not be allowed to stand against the holding in *Will, supra.*

B. By Granting Mandamus In This Case, The Fifth Circuit Has Adopted A Liberal Standard For The Issuance of Extraordinary Writs, One That Conflicts With Decisions In The Other Circuits.

The initial position taken by the majority of the courts in considering the availability of mandamus in §1404(a) petitions was restrictive. Mandamus was not available to review a court's exercise of discretion in the grant or denial of a §1404(a) motion to transfer. The extraordinary writ was only available when the power of a District Court to make an order was at issue or a question of law was raised.[3]

The appellate courts have recently retreated from that sound position. The majority of the circuits now indulge in some form of discretionary mandamus, but none to the extent now allowed by the Fifth Circuit. The First Circuit stands alone in adhering to the former view; its leading decision states:

> Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. §1651 grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by writ of mandamus any unappealable order which we believe should be immediately reviewable in the interests of justice.

In Re Josephson, supra at 177.

The First Circuit's continued allegiance to that view was recently demonstrated in *Codex Corporation v. Milgo Electronic Corporation,* 555 F.2d 735, 737 (1st Cir. 1977).

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3. *All States Freight, Incorporated v. Modrelli,* 196 F.2d 1010 (3d Cir. 1952); *Clayton v. Warlick,* 232 F.2d 699 (4th Cir. 1956); *Great Northern Railway Co. v. Hyde,* 238 F.2d 852 (8th Cir. 1956).

A summary analysis of the remaining circuits fails to show any court embracing as liberal a standard for issuance of the extraordinary writ as the Fifth Circuit's:

(1) *District of Columbia Circuit* — considers mandamus "an extraordinary remedy, and is to be used only where essential in the interest of justice." *Starnes v. McGuire,* 512 F.2d 918, 929 (D.C. Cir. 1974).

(2) *Second Circuit* — More than a difference of opinion in the proper disposition of §1404(a) motion is required; mandamus will only issue to correct "a clear-cut abuse of discretion." *A. Olinick & Sons v. Dempster Brothers, Inc.,* 365 F.2d 439, 445 (2d Cir. 1966). It should be also noted that as of this writing no writs have issued in satisfaction of that standard.

(3) *Third Circuit* — The court's most recent pronouncement allows mandamus "only where the trial court exceeded its authority or acted outside its jurisdiction." *Soloman v. Continental American Life Insurance,* 472 F.2d 1043 (3d Cir. 1973).

(4) *Fourth Circuit* — allows discretionary mandamus, but has recently questioned the wisdom of such review. *Ellicott Machine Corporation v. Modern Welding Company,* 502 F.2d 178, 181 (4th Cir. 1974).

(5) *Sixth Circuit* — requires an "exceptional case where there was a clear abuse of discretion or ursurpation of judicial power." *Lemon v. Druffel,* 253 F.2d 680, 685 (6th Cir. 1958).

(6) *Seventh Circuit* — adheres to a moderate view, requiring "a strong case of abuse of discretion." *Sypert v. Miner,* 266 F.2d 196, 199 (7th Cir. 1953).

(7) *Eighth Circuit* — The leading case announces that an "appellate court may not substitute [its] own discretion for that of the district court." *McGraw-Edison Company v. Van Pelt,* 350 F2d 361 (8th Cir. 1965).[4]

(8) *Ninth Circuit* — does not allow "full scale appeal" on mandamus nor will the Court "substitute its judgment for that of the judge most familiar with the problem." *Kasey v. Molybdenum Corporation of America,* 408 F.2d 16, 19-20 (9th Cir. 1969).

(9) *Tenth Circuit* — Its position is less solidified. This court has had only one opportunity to consider discretionary mandamus, *Texas Gulf Sulphur Co. v. Ritter,* 371 F.2d 145, 146-147 (10th Cir. 1967), wherein it announced the "clear showing of abuse of discretion" standard.

This rough survey of the circuits should reveal the variances among their respective standards. Reviewing those standards, it should be obvious that the Fifth Circuit has adopted the most liberal view among the circuits. In this case, the court became "a roving commission" which "substituted its judgment for that of the trial judge" without requiring that petitioner show "a clearcut abuse of discretion." *Josephson, supra; McGraw-Edison, supra; Kasey, supra; Olinick & Sons, supra.* Certiorari should

4. Recently reaffirmed in *Lora Company v. Alsop,* 565 F.2d 998, 1000 (8th Cir. 1977).

issue to resolve these apparant conflicts between the circuits and correct what has been termed a "hopeless conflict." *Clayton, supra.*

CONCLUSION

Certiorari should issue when (1) important federal questions are unsettled; (2) a conflict exists between the Court of Appeals' decision and previous decisions of the Supreme Court; (3) a conflict on a point of law exists between the circuits. This Petition presents the Court with all three situations. For the reasons advanced, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Fifth Circuit granting a writ of mandamus.

Respectfully submitted,

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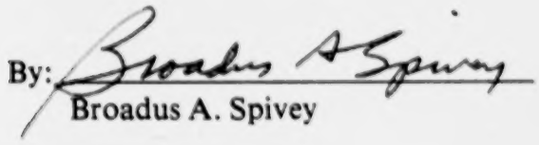
By: 
Broadus A. Spivey

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the following attorneys of record on this the 16th day of January, 1979; Mr. Bernard P. Evans, Attorney at Law, P.O. Box 2585, Lubbock, Texas 79408, and Mr. Rex Nichols, Attorney at Law, P.O. Box 2623, Longview, Texas 75601.

APPENDIX

Order Denying Transfer (November 29, 1977), Joe J. Fisher, United States District Judge A-1

Order Directing Response (January 3, 1978); Thornberry, Roney and Hill, Circuit Judges, Court of Appeals for the Fifth Circuit B-1

Order Granting Substitution (January 17, 1978), Roney and Hill, Circuit Judges, Court of Appeals for the Fifth Circuit C-1

Order Denying Petition for Writ of Mandamus (February 16, 1978), Thornberry, Roney and Hill, Circuit Judges, Court of Appeals for the Fifth Circuit..... D-1

Order Overruling Defendant's Motion to Transfer (April 14, 1978), Joe J. Fisher, United States District Judge..... E-1

Judgment Denying Defendant's Motion for an Amended Order (May 2, 1978), Joe J. Fisher, United States District Judge..... F-1

Order Denying Petition for Writ of Mandamus (June 5, 1978), Brown, Chief Judge, Coleman and Vance, Circuit Judges, Court of Appeals for the Fifth Circuit..... G-1

Order on Rehearing Granting Petition for Writ of Mandamus, (August 31, 1978), Brown, Chief Judge, Coleman and Vance, Circuit Judges, Court of Appeals for the Fifth Circuit H-1

In The
UNITED STATES DISTRICT COURT
for the Eastern District of Texas
Marshall Division

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

ORDER

On this date came on for consideration Defendant's Motion to Transfer in the above entitled and numbered cause and the Court being of the opinion that same should be overruled, it is therefore the ORDER of this Court that Defendant's Motion to Transfer be DENIED.

DONE AND ENTERED this the 29th day of November, 1977.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 77-3496

In Re:

COOPER TIRE & RUBBER COMPANY

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

BY THE COURT:

After initial consideration of Cooper Tire & Rubber Company's petition for writ of mandamus, the Court orders that respondents-plaintiffs Cynthia Allen Davidson, et al., file a response to said petition with this Court within 14 days of the date of this order. *See* Rule 21, Fed. R. App. P., Local Rule 22, Fifth Circuit.

SO ORDERED.

C-1

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 77-3496

In Re:

COOPER TIRE & RUBBER COMPANY

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

Before RONEY and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's application for substitution of Honorable Joe J. Fisher as respondent is GRANTED.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 77-3496

In Re:

COOPER TIRE & RUBBER COMPANY

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

BY THE COURT:

Cooper Tire & Rubber Company, petitioner here, is the named defendant in an action brought by Cynthia Allen Davidson, Ricky Davidson, and Dorman Allen in the United States District Court for the Eastern District of Texas, Marshall District. Petitioner moved, in that district court, for a transfer of the case from the Eastern District of Texas to the Northern District of Texas, Lubbock Division, under the provisions of 28 U.S.C. §1404 (a). The district judge presiding, Honorable Joe J. Fisher, denied the motion for transfer and petitioner seeks in this Court the issuance of a writ of mandamus directed to the district judge compelling the granting of the transfer.

From the record before us it appears that, shortly after the commencement of the case in the district court and before any discovery or other development of facts had taken place, the defendent filed its motion *alleging* facts which, if shown to be correct and if shown to have been all of the pertinent facts, would make a compelling case for a transfer to the Northern District of Texas. Plaintiffs responded merely by the filing of a brief in opposition to the motion. No additional facts were asserted by the plaintiff.

Thereafter, without the filing of any affidavits, depositions, answers to interrogatories, responses to requests for admissions, or the taking of testimony, the trial judge denied petitioner's motion. Whereupon, this application to our court for writ of mandamus was instituted.

After reviewing the matter, we requested and obtained a response to the motion filed on behalf of the plaintiffs in the district court. Here, for the first time, the plaintiffs, opposing the application for writ of mandamus, asserted some additional facts which they say supports venue in plaintiffs' chosen forum and militates against the grant of a transfer.

It thus appears that either the denial or grant of a transfer under 28 U.S.C. §1404 (a) by the district court on the date of its order, November 29, 1977, was premature. The trial judge had before him only the allegations of the defendant moving for the transfer and a law brief in opposition. No facts touching upon the factors to be considered under 28 U.S.C. §1404 (a) were found by the district court. Indeed, there existed no evidentiary basis for findings of

fact. It now appears that the plaintiffs in the district court, intervening here, seek to establish facts in addition to those alleged by the defendant in its verified motion. Those additionai facts have not yet ever been *alleged* in the district court.

This court will not undertake, initially, the conducting of hearings or consideration of other evidence in order to make the fact determination. Such is appropriate to the trial court.

We are considering an application for the writ of mandamus, not an interlocutory appeal. Therefore, our order does not go to the propriety of the entry of the district court's order denying transfer. We are to order the district judge to grant the transfer or decline to issue such an order. Inasmuch as, when the facts have been made to appear to the trial court, petitioner Cooper Tire & Rubber Company may renew its motion for transfer under 28 U.S C. §1404 (a), *Sypert v. Miner,* 266 F 2d 196 (7th Cir.) *cert. denied,* 361 U.S. 832 (1959); *United States Lines Company v. MacMahon,* 285 F. 2d 212 (2nd Cir. 1960), no prejudice exists on account of the premature order on the motion as originally filed.

For the reasons stated, petitioner's application for the writ of mandamus is DENIED.

E-1

In The
UNITED STATES DISTRICT COURT
for the Eastern District of Texas
Marshall Division

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

ORDER OVERRULING
DEFENDANT'S MOTION TO TRANSFER

On this 4th day of April, 1978, came on to be considered the Motion to Transfer filed herein by the Defendant and the Court having considered all pleadings on file in the above cause and all affidavits filed herein in connection with the Motion to Transfer and Reply thereto, and after having considered evidence and argument of counsel, does hereby make the following findings and orders.

The Court finds that the Defendant is engaged in doing business in the Marshall Division of the United States District Court for the Eastern District of Texas and the Court therefore has proper venue in this cause and the only question remaining to be determined is the matter of forum non conveniens.

It is the opinion of the Court and the Court so finds that the Plaintiff's choice of forum is the Marshall Divi-

sion of the United States District Court for the Eastern District of Texas and that such choice of forum by the Plaintiffs should be accorded great weight and should not be overruled absent clear and strong evidence. *Akers v. Norfolk & Western Ry. Co.*, (1967, CA4 Va.), 378 F. 2d 78; *Gulf v. Gilbert*, 330 U.S. 501 (1947).

The Court further finds that the litigation will in all likelihood reach a trial in the Marshall Division of the United States District Court for the Eastern District of Texas at an earlier date than if it is transferred to the Lubbock Division of the Northern District of Texas and in fact a transfer of the cause will effectuate a delay in the trial of this cause. The Court makes this finding after considering the relative facts in connection with the congestion of the Marshall Division docket as compared to the docket of the Lubbock Division of the United States District Court for the Northern District of Texas.

The Court is of the opinion and finds that the Plaintiffs do have material witnesses who will give testimony of a substantial nature in the trial of this cause who reside in Marshall, Harrison County, Texas. Further the Court finds that the Plaintiffs, as well as the Defendant, expect to call to testify certain expert witnesses who will testify to matters of a substantial nature and that Marshall is equally available to such experts and the parties as Lubbock.

The Court finds after consideration of the evidence adduced and the affidavits on file that the Defendant will not be unduly inconvenienced if this cause of action

is tried in Marshall, Texas, and that all parties will best be served if said cause is tried in Marshall, Harrison County, Texas.

The Court further finds that the convenience of the parties, the convenience of the witnesses, and the interest of justice dictate that Defendant's Motion for Transfer for Forum Non Conveniens be and hereby is in all things OVERRULED. *Ex Parte Gulf, Colorado & Santa Fe Ry. Co.*, 308 F 2d 803 (1962); and *Ex Parte John F. Blaski*, 245 F. 2d 737.

DONE and ENTERED this the 14th day of April, 1978.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge

F-1

In The
UNITED STATES DISTRICT COURT
for the Eastern Division of Texas
Marshall Division

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

JUDGEMENT DENYING DEFENDANT'S
MOTION FOR AMENDED ORDER

On April 4, 1978, Defendant's Renewed Motion to Transfer pursuant to 28 U.S.C., Section 1404 (a) in the above entitled and numbered cause of action came before this Court for consideration, and this Court being of the opinion that the same should be overruled, entered an Order Denying Transfer.

On this date came on for consideration Defendant's Motion to Amend the Order Denying Transfer entered on April 14, 1978, to include a finding that the same Order involves a controlling question of law. This Court, being of the opinion that the amendment should not be granted, and the Court being of the opinion that a controlling question of law is not involved to which there is a substantial ground for difference of opinion, and that an immediate appeal from the Order may not materially advance the ultimate termination of the litigation, it is therefore,

ORDERED that Defendant's Motion To Amend the Order of April 14, 1978, is in all things Denied.

SIGNED AND RENDERED this the 2nd day of May, 1978.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 78-2105

In Re:

COOPER TIRE AND RUBBER COMPANY,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 78-2105

In Re:

COOPER TIRE AND RUBBER CO.

Petitioner.

Petition for Writ of Mandamus
to the United States District Court
for the Eastern District of Texas

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

Per Curiam:

On prior consideration of this petition for mandamus we disagreed with the district court's denial of petitioner's motion to transfer but such action did not appear to be such an abuse of discretion as would justify mandamus.

On consideration of the petition for rehearing, however, we conclude that we cannot allow the order of the district court to stand. The accident which is the basis of this law suit occurred in the Northern District of Texas. The plaintiff lived in the Northern District of Texas. The hospital where plaintiff was treated and all attending physicians were in the Northern District of Texas. The vendors of the allegedly defective tire were in the Northern

District of Texas. Every person, thing and event involved in the accident and injury of plaintiff was in the Northern District of Texas.

It is true that defendant is subject to suit in the Eastern District of Texas, that plaintiff's choice of forum is entitled to great weight and that some of the experts engaged by plaintiff's counsel since suit was filed are in the Eastern District of Texas. Having said that, however, we have said very little in the context of this total situation.

Our reconsideration of the issue brings us to the conclusion that the interests of justice compel a transfer in this case. We otherwise work a very obvious and unnecessary hardship on defendant and at least impliedly put a stamp of approval on a rather blatant example of forum shopping. This is precisely the type of situation Congress sought to avoid by adoption of 28 U.S.C. §1404 (a). Accordingly, we instruct the district court to grant defendant's motion for transfer.

WRIT GRANTED.

NO. 78-2105

In Re:

COOPER TIRE AND RUBBER COMPANY

COLEMAN, Circuit Judge, dissenting

I respectfully dissent.

I think that Cooper Tire is the forum shopper in this case. It is a Delaware Corporation. Admittedly, it is subject to suit in the Eastern District of Texas. The allegedly defective tire was not made in Texas. The first and second sellers of the tire live in Texas but they are not parties to the suit. They did not manufacture the tire. The doctors, under the rule of privilege, cannot be expected to appear as witnesses for Cooper. It is not shown that a jury inspection of the scene of the accident would have any relevancy.

In Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L.Ed. 1051 (1947), a *forums non conveniens* case, the Supreme Court pointed out that "unless the balance is strongly in favor of the defendant, the plaintiffs choice of forum shall rarely be disturbed".

28 U.S.C., §1404 is written in purely discretionary terms. The statute says that "a district court *may* transfer" (emphasis added). As all the cases recognize, a failure to transfer may be overturned only for an abuse of judicial discretion.

We are not told how many witnesses Cooper has in the

Northern District of Texas. I doubt that it has any, for the tire was not manufactured there. In any event, if the plaintiff wishes to shoulder the burden of getting its witnesses to court in Marshall, Texas, I fail to see how that this should be any concern of Cooper's — or of this Court, for that matter. It certainly is not a matter upon which we, in the exercise of the extraordinary writ of mandamus, should sally forth proclaiming "abuse of judicial discretion".

I see nothing in this case to indicate that if Cooper had been sued in Wilmington, Delaware, it would have been sued in Wilmington, Delaware, it would have been clamoring for a change of venue to the Northern District of Texas. It simply does not want to stand trial in the Eastern District of Texas, and, by order of this Court, its forum shopping has been vindicated. If it had been left to me the Company would stand trial where it was sued.

Supreme Court, U. S.
FILED
FEB 10 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1125

The Honorable JOE J. FISHER,
United States District Judge,
Petitioner,

v.

COOPER TIRE & RUBBER COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fifth Circuit

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Attorneys for Respondent
February 9, 1979

SUBJECT INDEX

Citations ii

Questions Presented 2

Statement of the Case 2

Arguments

I. THE COURT OF APPEALS CORRECTLY INVOKED THE REMEDY OF MANDAMUS, BECAUSE THIS COURT HAS SETTLED THE QUESTION THAT USE OF THE "GREAT WRIT" APPLIES TO ANY CLEAR ABUSE OF DISCRETION, SUCH AS THE "BLATANT FORUM SHOPPING" HERE PRESENT 5

A. No real doubt remains that the "naked power" of the writ of mandamus can be used to correct a clear abuse of discretion 5

B. Mandamus applies under 28 U.S.C. §1651(a) without regard to whether a §1404(a) motion to transfer is granted or denied 6

II. THE COURT OF APPEALS CORRECTLY GRANTED MANDAMUS ON PETITION FOR REHEARING AFTER BRIEFING BY BOTH PARTIES, BECAUSE A CLEAR ABUSE OF DISCRETION EXISTED. A DECISION NOT IN CONFLICT WITH ANY DECISION BY ANOTHER CIRCUIT 7

A. No absolute right is given by FED.R.APP.P 40(a) to reply to a petition for rehearing, and especially where both parties have briefed the issues 7

B. No conflict exists between the decision in this case, applying a clear abuse standard, and any other case from another circuit 9

Conclusion 11

Certificate of Service 12

Exhibit A ..... Ex A-1

CITATIONS

CASES **Page**

Bankers Life & Casualty Co. v. Holland
346 U.S. 379 (1953) 5

Chicago, R.I. & P.R. Co. v. Igoe
212 F.2d 378 (7th Cir. 1954) 9

General Tire & Rubber Co. v. Watkins
373 F.2d 361 (5th Cir. 1967) 7

Hoffman v. Blaski
363 U.S. 335 (1960) 6

In Re Josephson
218 F.2d 174 (1st Cir. 1954) 6, 7

Koehring Company v. Hyde Construction Co.
324 F.2d 295 (5th Cir. 1963) 9

La Buy v. Howes Leather Co.
352 U.S. 249 (1957) 5, 7

Pacific Car & Foundary Co. v. Pence
403 F.2d 949 (9th Cir. 1968) 6

Schlagenhauf v. Holder
379 U.S. 104 (1964) 5, 7

Van Dusen v. Barrack
376 U.S. 612 (1964) 6

Will v. United States
389 U.S. 90 (1967) 7

RULES AND STATUTES

FED.R.APP.P. 40(a) 8

28 U.S.C. §1404(a) 2, 5, 6, 10

28 U.S.C. §1651 (a) 2, 6, 7

TEXTS AND TREATISES

9 MOORE'S FEDERAL PRACTICE §110.28 7

In The

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OCTOBER TERM, 1978

No. 78-1125

The Honorable JOE J. FISHER,
United States District Judge,
Petitioner.

v.

COOPER TIRE & RUBBER COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The United States Supreme Court:

Respondent, COOPER TIRE & RUBBER COMPANY, respectfully submits this brief in opposition to the petition for writ of certiorari, seeking review of the issuance of a writ of mandamus by the United Sates Court of Appeals for the Fifth Circuit to the petitioner, The Honorable JOE J. FISHER, United States District Judge for the Eastern District of Texas, ordering him to transfer a case from his district to the Northern District of Texas.

For clarity, special reference is made to the parties. Reference to the named petitioner is by "District Court;" reference to the true petitioners, the Davidson plaintiffs, is by

"plaintiffs;" and reference to the respondent, defendant Cooper Tire, is by "defendent."

QUESTIONS PRESENTED

Believing that plaintiffs have failed to accurately identify the issues, defendant restates the questions presented by this appeal:

1. Is mandamus an appropriate remedy for a clear abuse of discretion in denying a 28 U.S.C. §1404(a) motion to transfer?
2. Is the "great writ" of 28 U.S.C. §1651(a) limited to "protection of appellate jurisdiction" upon transfer of a case from one circuit to another?
3. Does an absolute right exist to answer a petition for rehearing or is it merely discretionary with the court?
4. Does the decision of the Fifth Circuit in this case conflict with the decision of any sister circuit?

STATEMENT OF THE CASE

The Davidson plaintiffs correctly state the procedural posture of the case but fail to state any of the underlying operational facts. This is an ordinary products liability case. As a result of a one-car accident allegedly caused by a defective tire, the plaintiffs sued defendent Cooper, the manufacturer of the tire, in the Eastern District of Texas. Defendant moved to transfer the case to the Northern District of Texas pursuant to 28 U.S.C. §1404(a).

The District Court denied the motion shortly after filing without a hearing and before any discovery (*see* APPENDIX

A).[1] Defendant then petitioned for writ of mandamus to the Fifth Circuit, which ordered a response by plaintiffs (B-1). After submission of briefs by both plaintiffs and defendant, the Fifth Circuit denied the mandamus but ruled that any denial or grant of the motion to transfer by the District Court "was premature" (B-2,3). The Fifth Circuit also ruled that the facts alleged by defendant "make a compelling case for a transfer;" hence, defendant could renew its motion upon completion of discovery (B-2,3).

Discovery was promply instituted. The result of that discovery is shown by defendant's renewed motion to transfer.[2] As detailed by that renewed motion, discovery revealed no connection then existed between plaintiffs' claim and the Eastern District of Texas, except one of plaintiffs' attorneys resided in that district. Specifically, all of the following operational facts occurred within the Northern District of Texas:

(1) occurrence of the single car accident;
(2) the residence of all plaintiffs;
(3) the hospitalization of the injured plaintiff;
(4) the treatment of the injured plaintiff by seven doctors;
(5) the location of all medical records;
(6) the residence of the passenger witness;
(7) the residence of the investigating officer;
(8) the original purchase of the tire;

---

[1] The appendices to which various references are made in this statement are those appendices attached to the PETITION FOR WRIT OF CERTIORARI. Further references to the appendices attached to the petition are by the capital letter of the appendix, followed by the page number of the appendix, such as "B-1, E-2," and so forth.

[2] The renewed motion to transfer is attached to this brief as Exhibit A.

(9) the residence of the original purchaser (not a plaintiff) of the tire;

(10) the residence of the original vendor of the tire;

(11) the residence of the witness who dismounted the tire; and

(12) the residence of plaintiffs' expert witness on the tire.

At the time of the filing of the renewed motion, all of the above witnesses, some fifteen in number, resided in the Northern District of Texas.

Following answer by the plaintiffs to the renewed motion to transfer and submission of briefs by both sides, the District Court heard the renewed motion (E-1). By the time of the hearing,[3] plaintiffs had contacted six other potential expert witnesses, some of whom had a "connection" with the Eastern District of Texas. As factually developed at the hearing, these new witnesses included: a local medical doctor (who first examined the plaintiff on the date of the hearing); a local tire expert; a local life expectancy witness; a Florida human factors witness; a Louisiana photographer; and an Austin, Texas, rehabilitation expert.

Other than the three recently contacted Eastern District witnesses and one attorney for the plaintiffs, no other connection existed between plaintiffs' claim and the Eastern District. Defendant, a foreign corporation, had qualified to do business in Texas but only had a registered agent and office in the Northern District of Texas, as shown by the attached renewed motion. As also shown by the renewed motion, the tire in issue was not manufactured in Texas and was originally

[3] The transcription of the hearing was attached to the renewed petition for mandamus, along with all factual affidavits and the material portions of the depositions.

introduced into commerce in the Northern District of Texas.

Following the hearing on the renewed motion, the District Court again denied the motion to transfer (E-1). Defendant again petitioned the Fifth Circuit for writ of mandamus, which peition attached all of the material motions, briefs, orders, affidavits and discovery. The Fifth Circuit originally denied the writ (G-1), following which defendant petitioned for rehearing *en banc*. The writ of mandamus was finally granted on rehearing (H-1), without additonal briefing by the parties.

ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY INVOKED THE REMEDY OF MANDAMUS, BECAUSE THIS COURT HAS SETTLED THE QUESTION THAT USE OF THE "GREAT WRIT" APPLIES TO ANY CLEAR ABUSE OF DISCRETION, SUCH AS THE "BLATANT FORUM SHOPPING" HERE PRESENT.

A. No real doubt remains that the "naked power" of the writ of mandamus can be used to correct a clear abuse of discretion.

Plaintiffs argue that this court has never directly decided the propriety of use of mandamus by a court of appeals as a remedy in the disposition of 28 U.S.C. §1404(a) motions. While this court has never made such an express holding, this court has settled the question that the use of the "great writ" of mandamus is appropriately issued when there is a clear abuse of discretion. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); and *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953). As expressly noted in *La Buy*, at 255, 257, no question exists as to

the "naked power" to issue the writ for a clear abuse. Such "naked power" extends to use of mandamus for a denial to transfer under a §1404(a) motion. *Pacific Car & Foundary Co. v. Pence*, 403 F.2d 949, 952 (9th Cir. 1968).

In addition, while this court has never expressly approved the use of the writ, it also has never questioned the use of the writ. In *Hoffman v. Blaski*, 363 U.S. 335 (1960), neither the parties nor this court questioned the propriety of mandamus by a court of appeals as a remedy to review denial of a §1404(a) motion. Such a refusal by this court to question the propriety of mandamus continued in *Van Dusen v. Barrack*, 376 U.S. 612, 615, fn. 3 (1964).

When this refusal to question the propriety of the use of mandamus is juxtaposed with the settled use of the great writ for any clear abuse of discretion, no important federal question remains. All that remains in any case is to test for a clear abuse of discretion. Therefore, the application of such a settled test hardly requires the grant of certiorari.

B. Mandamus applies under 28 U.S.C. §1651(a) without regard to whether a §1404(a) motion to transfer is granted or denied.

Plaintiffs alternatively assert that if mandamus is a proper remedy, such a remedy applies only when the district court grants a §1404(a) motion and transfers the case out of its appellate district. The plaintiffs reason that only where the transfer is to a different appellate circuit is there an "appropriate aid" of jurisdiction pursuant to the All Writs Act, 28 U.S.C. §1651(a). Plaintiffs cite only *In Re Josephson*, 218 F. 2d 174 (1st Cir. 1954), a case which does contain language supportive of plaintiffs' argument.

What plaintiffs fail to mention, however, is that the *Josephson* rationale has been firmly rejected by this court. *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); and 9 MOORE'S FEDERAL PRACTICE §110.28, fn. 2. For application of the rule in the circuit courts, consult *General Tire & Rubber Co. v. Watkins*, 373 F.2d 361 (5th Cir. 1967). Under these authorities, 28 U.S.C. §1651(a) mandates use of mandamus to correct a clear abuse of discretion without regard to frustration of review on appeal after final judgment.

In sum, this court has settled the use of the great writ for any clear abuse of discretion without regard to frustration of appellate jurisdiction. Thus, writ of certiorari becomes wholly unnecessary in light of the clear abuse here present.

II. THE COURT OF APPEALS CORRECTLY GRANTED MANDAMUS ON PETITION FOR REHEARING AFTER BRIEFING BY BOTH PARTIES, BECAUSE A CLEAR ABUSE OF DISCRETION EXISTED, A DECISION NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT.

A. No absolute right is given by FED.R.APP.P. 40(a) to reply to a petition for rehearing, and especially where both parties have briefed the issue.

Plaintiffs next claim that the action of the Fifth Circuit creates a conflict of decisions. In introducing their argument, plaintiffs initially assert that the Fifth Circuit abused its discretion because if failed to consider both sides of the question, citing in support *Will v. United States*, 389 U.S. 909 (1967). *Will*, however, has no application, because that case rested on the principle that a court should write an opinion

giving a statement of its legal reasons as sufficient grounds for granting the writ. Therefore, the argument must initially fail, because the Fifth Circuit wrote such an opinion, finding this case to be a "blatant example of forum shopping" (H-2).

In reality, what the plaintiffs seek to assert is that they were denied an opportunity to submit another brief. Plaintiffs, however, miss the point. The Fifth Circuit here granted mandamus on petition for rehearing *en banc* pursuant to FED.R.APP.P. 40(a). This rule only indicates that a court of appeals ordinarily will not grant rehearing unless it has first requested an answer. Thus, stating what ordinarily occurs hardly amounts to either a requirement or an abuse of discretion.

Factually, and as dictated by common sense, the Fifth Circuit had no need to require an answer to grant the mandamus upon peition for rehearing. The parties had twice briefed the issue in the District Court. The parties again briefed the case at the initial mandamus stage. Then, defendant not only briefed the case in its renewed petition for mandamus but, in addition, attached to that renewed petition, the material motions, affidavits, discovery and briefing for both sides. Thus, plaintiffs were hardly denied an opportunity to make known their position to the Fifth Circuit. After all, plaintiffs could well have petitioned for rehearing following the grant of the mandamus.

In short, the Fifth Circuit properly stated its rationale, followed the applicable rules and properly reviewed all competing arguments. Nothing more should be required.

B. No conflict exists between the decision in this case, applying a clear abuse standard, and any other case from another circuit.

The plaintiffs next move to establish an asserted conflict of decisions, by urging that the Fifth Circuit adopted a liberal standard. Such an argument must initially fail, because the opinion of the Fifth Circuit reveals no adoption of any standard, either liberal or conservative. In addition, adoption *vel non* of a standard is not the test, but whether a conflict of decisions exists.

The opinion of the Fifth Circuit creates no conflict of decisions. While plaintiffs have reviewed at least one decision from each circuit, that review establishes no conflict. Rather, the review demonstrates that all courts of appeal recognize the propriety of mandamus for a clear abuse of discretion, although variously expressed in some courts of appeal. However stated, the question here becomes whether a district court clearly abused its discretion.

The presence of clear abuse and the absence of the adoption of any new standard are indicated by the operative facts applied to decisions of the Fifth Circuit. The case of *Koehring Company v. Hyde Construction Co.*, 324 F.2d 295 (5th Cir. 1963) demonstrates the standard in the Fifth Circuit. There the Fifth Circuit tested for an abuse of discretion by applying the three elements of 28 U.S.C. §1404(a). The Fifth Circuit cited as authority the case of *Chicago, R.I. & P.R.Co. v. Igoe*, 212 F.2d 378 (7th Cir. 1954), the case most factually identical to this case. Juxtaposing the facts here present, with those in *Koehring* and *Igoe*, rejects both the adoption of any liberal standard or a conflict of decisons.

Factually pertinent in this case was the almost total absence of any connection with the Eastern District of Texas. Other than the choice of forum — in reality, the choice of plaintiffs' counsel — absolutely no connection with the Eastern District existed until shortly prior to the hearing of the renewed motion to transfer. To this must be added the three potential witnesses local to the Eastern District, contacted by plaintiffs immediately prior to the hearing on the renewed motion. Employing a local doctor, a life insurance salseman and a person with knowledge of tires, hardly supplies sufficient nexus to the Eastern District where all of the operative facts occurred in the Northern District. After all, as counsel for plaintiffs admitted, persons with the same qualifications could be readily found in the Northern District. With no substantial or material connection with the Eastern District, the Fifth Circuit justifiably called this a case of "blatant forum shopping" (H-2).

Since preventing such forum shopping was exactly the purpose of 28 U.S.C. §1404(a), such a blatant example here present constitutes a clear abuse of discretion and rejects any conflict of decisions. Therefore, no important federal question remains unsettled and no conflict exists between any of the circuits or with this court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied and the grant of mandamus by the United States Court of Appeals for the Fifth Circuit upheld, with costs taxed to the plaintiffs.

KEY, CARR, EVANS & FOUTS
P.O. Box 2585
Lubbock, Texas 79408

Donald M. Hunt
Attorneys for Respondent

CERTIFICATE OF SERVICE

This brief has been served on petitioner/plaintiffs by mailing a copy to the attorneys of record, Broadus A. Spivey, SPIVEY AND GRIGG, P.O. Box 2011, Austin, Texas, 78768, on February 8, 1979.

Of The Firm

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

DEFENDANT'S RENEWED MOTION TO TRANSFER

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, COOPER TIRE AND RUBBER COMPANY, moves the Court to transfer this cause to the Northern District of Texas, Lubbock Division, pursuant to 28 USC §1404(a), on the following grounds:

1. Transfer to a more convenient forum, the Northern District of Texas, Lubbock Division, is justified on the grounds of convenience of the parties and witnesses and in the interests of justice. Transfer is also justified because venue is proper in the Northern District of Texas, Lubbock Division.

2. Venue is proper in the Northern District of Texas, Lubbock Division, pursuant to 28 USC §1391(a) because the accident which forms the basis of Plaintiffs' complaint occurred within the Northern District of Texas, Lubbock Division and because Defendant's registered agent for service of process,

CT Corporation Systems, has its office in Dallas, Texas within the United States District Court for the Northern District of Texas.

3. Transfer to a more convenient forum, the Northern District of Texas, Lubbock Division, is justified on the basis of the following facts:

(a) The accident in question occurred 5.8 miles north of Levelland, Texas on Farm Road 1294, in Hockley County, Texas, within the Northern District of Texas, Lubbock Division. (Deposition of R.C. Cheek, page 8, line 14 through page 10, line 4.)

(b) Following the accident, Plaintiff, Cynthia Allen Davidson, was hospitalized in Lubbock, Lubbock County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Mrs. Nancy Allen, page 7, lines 16 through 19.)

(c) Plaintiff, Cynthia Allen Davidson, resides in Whiteface, Hockley County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Cynthia Allen Davidson, page 5, lines 6 through 11.) Plaintiff, Ricky Davidson, resides in Whiteface, Hockley County, within the Northern District of Texas, Lubbock Division. (Deposition of Ricky Davidson, page 6, line 1 through page 8, line 20.) Plaintiff Dorman Allen, resides northwest of Abernathy, Lubbock County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Dorman Allen, page 4, lines 6 through 24.)

(d) Defendant, Cooper Tire and Rubber Company, has no manufacturing or production facilities located in the Eastern District of Texas. Cooper Tire and Rubber Company's tire production facility located at Texarkana is in Miller County, Arkansas. (Affidavit of James Nowlin, attached hereto.)

(e) The tire which is the subject of this action was not built at Cooper Tire and Rubber Company's facilities in Texarkana, Arkansas. The type of Cooper brand tire which is the subject of this cause of action has never been built at the Cooper Tire and Rubber Company's facilities at Texarkana, Arkansas. (Affidavit of James Nowlin.)

(f) The tire in question contained a required identification number which indicated that the plant at which it was manufactured was in Findlay, Ohio. (Deposition of Mr. Joseph Davis, page 38, lines 21 through 24.)

(g) Plaintiff, Cynthia Allen Davidson, was treated after the accident by the following doctors. (Deposition of Mrs. Nancy Allen, page 7, line 21 through page 10, line 18.)

(1) Dr. Jack Dunn, Jr., who resides and practices in Lubbock, Lubbock, County, Texas, within the Northern District of Texas, Lubbock Division;

(2) Dr. Gordon Mayes, who resides and practices in Lubbock, Lubbock County, Texas, within the Northern District of Texas, Lubbock Division;

(3) Dr. Obie L. Stalcup, who resides and practices in Lubbock, Lubbock County, Texas, within the Northern District of Texas, Lubbock Division;

(4) Dr. Lester Wolcott, who practices with the Texas Tech University School of Medicine and who resides and practices in Lubbock, Lubbock County, Texas within the Northern District of Texas, Lubbock Division;

(5) Dr. Edward F. Thomas, who resides in Amarillo, Potter County, Texas and practices at the Biven Rehabilitation Hospital in Amarillo, Texas within the Northern District of Texas, Amarillo Division;

(6) Dr. Richard Kibbey, who resides and practices in

Amarillo, Potter County, Texas within the Northern District of Texas, Amarillo Division; and

(7) Dr. R. Paige, who resides and practices in Amarillo, Potter County, Texas within the Northern District of Texas, Amarillo Division.

(h) Plaintiff, Cynthia Allen Davidson's medical records are in Lubbock, Lubbock County, Texas within the Northern District of Texas, Lubbock Division and at the Bivens Rehabilitation Hospital in Amarillo, Potter County, Texas within the Northern District of Texas, Amarillo Division.

(i) The investigating officer, R.C. Cheek, resides in Levelland, Hockley County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of R.C. Cheek, page 5, lines 8 through 18.)

(j) Rebecca Bowden, a passenger in Cynthia Allen Davidson's vehicle when the accident occurred, permanently resides in Levelland, Hockely County, Texas within the Northern District of Texas, Lubbock Division, and presently resides in Canyon, Potter County, Texas within the Northern District of Texas, where she is going to school. (Deposition of Rebecca Bowden, page 7, lines 5 through 25.)

(k) Mr. Juan Rodriquez, an employee of Larry Beseda, originally purchased the tire in question for Mr. Beseda from Luper Tire Company. He resides in Levelland, Hockley County, Texas within the Northern District of Texas, Lubbock Division. (Deposition of Juan Rodriquez, page 6, lines 4 through 6.)

(l) Mr. Larry Beseda, the original purchaser of the tire in question, resides in Whiteface, Cochran County, Texas, within the Northern District of Texas, Lubbock Division. (Deposition of Larry Beseda, page 5, line 18 and page 6, lines 8 through 14.)

(m) Luper Tire Company, the original vendor of the tire in question, has its principal place of business where the tire in question was purchased in Morton, Cochran County, Texas, within the Northern District of Texas, Lubbock Division. (Deposition of Larry Beseda, page 11, lines 3 through 6.)

(n) Dr. Raymond W. Mires, Plaintiffs' tire expert, resides in Lubbock, Lubbock County, Texas, within the Northern District of Texas, Lubbock, Division.

(o) Defendant intends to depose Bradley Webber, the employee of the Phillips 66 Station in Whiteface, Texas, who dismounted the tire in question after the accident. He resides in Whiteface, Cochran County, Texas, within the Northern District of Texas, Lubbock, Division.

4. The transfer of this cause of action to the Northern District of Texas, Lubbock Division, is further justified because the foregoing witnesses, all of whom are necessary for trial of this case, reside within the Northern District of Texas, Lubbock Division, and are beyond the subpoena power of this Court. The distance between Lubbock and Marshall is 476 miles. Transfer of this cause would avoid undue prejudice which will result from the unavailability of these witnesses who reside within the Northern District of Texas.

ON THESE PREMISES, Defendant, COOPER TIRE AND RUBBER COMPANY, moves this Court to transfer this cause of action to the Northern District of Texas, Lubbock Division, on the grounds stated herein.

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NICHOLS AND PARKER
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Lubbock, TX 79408

By /s/ Bernard P. Evans
Bernard P. Evans

Attorneys for Defendant

THE STATE OF TEXAS §
COUNTY OF LUBBOCK §

BEFORE ME, the undersigned authority in and for said county, Texas, personally appeared BERNARD P. EVANS as attorney for Cooper Tire and Rubber company, and, upon his oath, stated that he is attorney for Cooper Tire and Rubber Company, and that the facts, matters and allegations stated in Paragraph 2 above are true and correct.

/s/ Bernard P. Evans
BERNARD P. EVANS

SUBSCRIBED AND SWORN TO before me, by the said Bernard P. Evans, this 29th day of March, 1978, to certify which witness my hand and seal of office.

/s/ Ginger Burk
Notary Public in and for
Lubbock County, Texas

My commission expires 10-21-79

Ex A-7

STATE OF ARKANSAS)
) ss.
COUNTY OF MILLER)

James Nowlin, Affiant, being first duly sworn, says that he is employed by the Cooper Tire & Rubber company in the position of Plant Manager of Cooper Tire & Rubber Company's tire production facilities located in Texarkana, Miller County, Arkansas. Affiant further states that he has been employed with Cooper Tire & Rubber Company for seven years and has personal knowledge involving the information stated herein. Affiant further states that the tire which is the subject of the above-captioned case was not built at Cooper Tire & Rubber Company's facilities at Rt. 12, Box 252, Texarkana, Miller County, Arkansas. And Affiant further states that this type of Cooper brand tire has never been built at the Cooper Tire & Rubber Company's facilities at Rt. 12, Box 252, Texarkana, Miller County, Arkansas.

And further Affiant saith naught.

/s/ James Nowlin
James Nowlin

Sworn to before me and subscribed in my presence this 10th day of March, 1978.

/s/ (illegible)
Notary Public

Ex A-8

AFFIDAVIT IN SUPPORT OF
DEFENDANT'S RENEWED MOTION TO TRANSFER

In support of Defendant, COOPER TIRE AND RUBBER COMPANY'S renewed motion to transfer the above numbered cause to the Northern District of Texas, Lubbock Division, pursuant to 28 U.S.C. §1404(a), the undersigned affiant, as attorney for Defendant, being duly sworn, states the following:

1. I have read the foregoing motion and believe all of the facts stated therein to be true and correct.

2. The attorney for Plaintiffs who has appeared at all depositions and participated in all discovery on behalf of the Plaintiffs, Mr. Broadus Spivey, resides and practices in Austin, Travis County, Texas, which is in the United States District Court for the Western District of Texas, Austin Division. Scott Baldwin, whom Mr. Spivey has associated as attorney for Plaintiffs, has not participated in any of the discovery. Mr. Baldwin, who lives and practices in Marshall, Harrison County, Texas, is the Plaintiffs' only connection with the United States District Court for the Eastern Division of Texas, Marshall Division.

/s/ Bernard P. Evans
BERNARD P. EVANS

SUBSCRIBED AND SWORN TO BEFORE ME by the said BERNARD P. EVANS, this the 29th day of March, 1978, to certify which witness my hand and seal of office.

/s/ Karol McVay
Notary Public in and for
Lubbock County, Texas

My Commission expires: 12-31-78